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2013 IL App (4th) 130027-U

NO. 4-13-0027

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 25, 2013

Carla Bender

4<sup>th</sup> District Appellate  
Court, IL

In re: the Marriage of	)	Appeal from
LORI A. HARDY,	)	Circuit Court of
Petitioner-Appellant and	)	Sangamon County
Cross-Appellee,	)	No. 11D462
and	)	
JOHN C. HARDY, JR.,	)	Honorable
Respondent-Appellee and	)	Esteban F. Sanchez,
Cross-Appellant.	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.

Justices Appleton and Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court (1) properly exercised its discretion in finding that John Hardy produced insufficient evidence to establish Lori Hardy was cohabiting with her paramour so as to preclude any maintenance; (2) abused its discretion by awarding Lori Hardy rehabilitative maintenance for 24 months, rather than permanent maintenance; and (3) abused its discretion by deciding each party was responsible for his or her own attorney fees.

¶ 2 In December 2012, the trial court entered an order dissolving the marriage of petitioner, Lori A. Hardy, and respondent, John C. Hardy, Jr. Following three hearings in July, September, and October 2012, the court (1) found John did not sufficiently prove Lori was cohabiting with her paramour so as to bar maintenance, (2) ordered John to pay Lori \$2,000 per month in rehabilitative maintenance for 24 months, and (3) ordered each party to pay his or her own legal fees.

¶ 3 Lori appeals, arguing the trial court abused its discretion by (1) awarding only 24

months of rehabilitative maintenance and (2) denying her an award of legal fees. John cross-appeals, arguing the court's finding he failed to prove Lori was cohabiting with her paramour on a resident, continuing conjugal basis was against the manifest weight of the evidence.

¶ 4 We (1) affirm the trial court's finding of insufficient evidence of cohabitation on a resident, continuing conjugal basis; (2) modify the court's award of rehabilitative maintenance to permanent maintenance; and (3) reverse the trial court's ruling on attorney fees and award Lori all fees she has yet to pay. We affirm in part as modified and reverse in part.

¶ 5 I. BACKGROUND

¶ 6 Lori and John married on May 25, 1989. The parties had two children during their marriage.

¶ 7 A. The Marriage

¶ 8 John has a bachelor's degree in engineering and works in the aviation and aircraft construction industry. John was the primary breadwinner during the marriage. John started out making \$10 an hour when the couple first married and now makes approximately \$125,000 a year. During the marriage, Lori maintained the household and was the primary caretaker of the children. Lori has a general equivalency diploma (GED), but no other education. John encouraged Lori to continue her education. She took a few night classes but did not otherwise continue her education. Rather, Lori began to work part-time caring for a quadriplegic woman and cleaning houses, earning approximately \$11,000 a year.

¶ 9 Lori has a history of substance abuse. Lori's daughter Ashley testified her mother abused prescription drugs while she was growing up. John testified they moved to the country so Lori could move away from people who used drugs. He stated he was an involved parent, and due

to Lori's drug and alcohol use, she was less involved. In 2010, Lori was admitted into a rehabilitation center for addiction to alcohol and prescription drugs. Lori admitted she had a substance abuse problem, but she stated she no longer takes drugs not prescribed to her and no longer abuses alcohol.

¶ 10 B. The Separation

¶ 11 In November 2008, the parties physically separated. Lori moved out of the home with their youngest daughter, Ashley. During this time, John paid rent, general expenses on Lori's rental home, and living expenses for Lori and Ashley (who was 16 at the time). John periodically stayed at Lori's rental home. John continued paying expenses while Ashley lived with Lori. During this time, Lori began working for area cleaning services and then began her own cleaning business. Lori's cleaning business has one employee, Rob Ross, Lori's boyfriend.

¶ 12 In November 2008, John sold the parties' marital home and the proceeds went to pay marital debt. They owed approximately \$75,000 in credit card and other debt. By negotiating with companies, making payments, and cashing in a 401(k) account worth approximately \$60,000, John was able to pay a large portion of that debt. Lori has several medical conditions, including back problems, colitis, depression, and pancreatitis. Lori takes medications for these conditions and had surgery to correct a herniated disk in her back.

¶ 13 John has paid educational expenses for both their adult daughters. John continues to pay all of Ashley's college and living expenses. Ashley is 20 years old and she works part-time and takes two classes at a community college. According to John's financial affidavits, he pays \$1,225 per month to support Ashley.

¶ 14 C. Lori's Relationship With Rob Ross

¶ 15 Lori and Rob Ross had been dating for approximately one year at the time of the hearings. Rob works for Lori's cleaning business and as a musician. Rob works for Lori on larger jobs when she needs him. Rob lives in Rochester in a mobile home he purchased two years ago, which sits on his father Winn Ross's land. Rob often stays with Lori. Ashley testified between the time her mother met Rob and when Ashley moved out in May 2012, Rob was at their home all the time. Rob and Lori testified Rob stayed less frequently. Terry Lowe, a private detective hired by John Hardy, testified he observed Lori's residence and noticed on numerous occasions the truck belonging to Rob would be parked at Lori's residence late at night and early in the morning.

¶ 16 Ashley testified she lived with her mother when her mother started dating Ross, but when her mother moved to a one-bedroom house she had to find another place to live. She stated Ross was at the new home all the time, did household chores, contributed to household expenses, and had clothes in the closet. Ross claimed he did not leave clothes at Lori's residence. Lori and Ross have been observed watering plants at her residence. Lori and Rob went on a cruise to the Bahamas, which Ross received for free from his credit card miles, and they spent holidays together.

¶ 17 After John stopped providing maintenance in May 2011, Lori borrowed \$4,000 from Ross to pay her second attorney and purchase a refrigerator. Rob Ross's father, Winn Ross, cosigned a note for a house she purchased. Winn testified that Rob and Lori are dating and he offered to cosign on the house because he wanted to help her and felt the home was a good investment. Lori and Rob sometimes split the cost of groceries, but they have separate bank accounts.

¶ 18 D. The Proceeding

¶ 19 In May 2011, Lori filed a petition for dissolution of marriage in Sangamon County.

Lori sought maintenance and other relief. John filed a response asserting Lori was not entitled to maintenance or an award for attorney fees. In December 2011, John's counsel filed a motion to compel discovery, which was granted by agreement. The matter was continued and then set for a final hearing on July 17, 2012.

¶ 20 In April 2012, Lori filed a petition for interim attorney fees and costs owed to attorney Rhonda Jenkins, requesting \$2,103 in interim attorney fees and setting it for a hearing. A hearing was held in May, at which John failed to appear; the docket entry shows no ruling was entered and the issue was taken under advisement. A later May hearing at which Lori was represented by Jenkins shows no discussion of attorney fees.

¶ 21 Between the April 2012 petition and the July 2012 hearing, Lori hired a different attorney, Thomas Dorsey. On the morning of July 17, 2012, Dorsey appeared for Lori, but Lori was not present in the courtroom. Later that morning, Lori arrived and her attorney requested extra time to prepare. Lori was granted a continuance until the afternoon. The hearing commenced at 1:30 p.m. After hearing testimony by John, the private investigator, and Lori, the court recessed. Two further hearings were held in September and October 2012.

¶ 22 In August 2012, Lori filed another petition for attorney fees, requesting \$3,150 for outstanding and anticipated legal fees. John responded Lori was not entitled to attorney fees because she caused unnecessary delays by failing to respond to discovery requests, hiring a different attorney before the July 2012 hearing, and arriving late to the July 2012 hearing. John then filed a petition for attorney fees from Lori, claiming all proceedings after the July 2012 hearing were unnecessary and redundant and seeking \$4,522 in fees incurred after the July 2012 hearing. The court again took the issue of attorney fees under advisement. The court took the case

under advisement and continued the proceedings for written arguments and its ruling. On December 12, 2012, the trial court entered a docket entry stating "each party shall be responsible for the payment of their own attorney fees." On December 13, 2012, the court's final written judgment found the parties "agree to pay their own attorney fees."

¶ 23 The December 2012 final judgment dissolved the parties' marriage. The trial court found the evidence conflicting and insufficient to establish cohabitation between Lori and Ross. The court awarded Lori \$2,000 in "temporary rehabilitative maintenance" for 24 months. After 24 months, maintenance is reviewable upon a petition filed by Lori, who will have the burden of establishing the need to extend the award.

¶ 24 In the final written judgment, the trial court divided assets according to the parties' October 2012 agreement. Under the agreement's terms, Lori received a 401(k) worth about \$16,800. John received his retirement from the National Guard and his employer's pension plan. John's retirement from the National Guard will begin to pay him \$250 per month at age 60 and provide health insurance. His pension from his employer will provide \$300 per month upon retirement.

¶ 25 The trial court divided the remaining marital debt. John was responsible for all personal loans, his medical bills, and any credit card debt after the parties separated in November 2008. Similarly, Lori was responsible for all her personal loans, all her medical bills, debt from the home she rented during the parties' separation, the personal loan for the purchase of her current residence, and any credit card debt after November 2008. According to John's testimony, the parties have approximately \$20,500 in outstanding debt. John is responsible for \$4,000, representing a personal loan from his father. Lori is responsible for about \$8,000 in medical bills

and \$2,000 for back rent and damages on the rental property where Lori lived with Ashley during the separation. A \$6,000 debt representing a joint loan the parties took out against the 401(k) is John's responsibility and does not diminish the net value of the 401(k) awarded to Lori.

¶ 26 This appeal and cross-appeal followed.

¶ 27 II. ANALYSIS

¶ 28 This appeal presents two issues. First, John by cross-appeal argues the trial court's finding Lori is not barred from maintenance because he produced insufficient evidence to prove Lori cohabits with another person on a resident, continuing conjugal basis is against the manifest weight of the evidence. Second, Lori argues the trial court abused its discretion by (1) awarding her rehabilitative maintenance for 24 months, rather than permanent maintenance; and (2) failing to award her attorney fees.

¶ 29 A. Cohabitation On a Resident, Continuing Conjugal Basis

¶ 30 A finding of fact by the trial court will not be overtured on review unless the finding is against the manifest weight of the evidence. *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1041, 899 N.E.2d 1097, 1103 (2008). As "the trial court is in a superior position to judge the credibility of the witnesses," factual determinations are afforded great deference. *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801, 617 N.E.2d 1313, 1316 (1993).

¶ 31 The Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) states, "the obligation to pay future maintenance is terminated \*\*\* if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis." 750 ILCS 5/510(c) (West 2012). To terminate maintenance under this provision, the party seeking to terminate maintenance must show "the recipient spouse is involved in a *de facto* husband-wife relationship." *In re Marriage of*

*Lambdin*, 245 Ill. App. 3d 797, 801, 613 N.E.2d 1381, 1385 (1993). To make such a showing, "something more than merely living with another person of the opposite sex is required," and courts generally look at "facts which would lead a reasonable observer to believe that the individuals were husband and wife." *Lambdin*, 245 Ill. App. 3d at 801, 613 N.E.2d at 1385-86.

¶ 32 In determining if parties are in a *de facto* husband-wife relationship or simply dating, courts look at various factors of the relationship, including "(1) its length; (2) the amount of time [the spouse receiving maintenance and the third party] spent together; (3) the nature of the activities they engaged in; (4) the interrelation of their personal affairs; (5) their vacationing together; and (6) their spending holidays together." *In re Marriage of Herrin*, 262 Ill. App. 3d 573, 577, 634 N.E.2d 1168, 1171 (1994).

¶ 33 The trial court could have concluded Lori and Rob's one-year relationship was relatively short. For instance, in *Herrin*, 262 Ill. App. 3d at 574, 634 N.E.2d at 1169, the relationship lasted 2 1/2 years before maintenance was terminated. Similarly, in *In re Marriage of Snow*, 322 Ill. App. 3d 953, 750 N.E.2d 1268 (2001), the spouse whose maintenance was terminated had been living with a third party for 1 1/2 years. *Id.* at 955, 750 N.E.2d at 1269. On the other hand, courts have found a resident, continuing conjugal relationship in shorter relationships when it can be proved the party receiving maintenance moved in with another party on a full-time basis and intended to remain. *In re Marriage of Roofe*, 122 Ill. App. 3d 56, 59-60, 460 N.E.2d 784, 786 (1984). For example, in *Roofe*, the party receiving maintenance had been in a relationship for nine months and had been living with the third party for only six weeks before the hearing, but the spouse abandoned her former residence, moved all her belongings to the third party's house, and planned to stay indefinitely. *Roofe*, 122 Ill. App. 3d at 58-9, 460 N.E.2d at 785-



86.

¶ 34           Lori and Ross had been in a relationship for about a year, which is a relatively short period compared to many termination of support cases. The evidence the parties actually resided together was inconclusive. Rob, Lori, and Rob's father all testified Rob lived in Rochester and stayed at Lori's residence occasionally. Rob maintained his own home. He paid taxes and electricity bills on his home in Rochester. The private investigator testified he often saw Rob's truck at Lori's residence; however, the truck was used in the cleaning business, for which Ross works. His testimony did not prove how much time Ross actually spent at Lori's home. Lori's daughter, who lived with Lori until May 2012, testified at the end of 2012 Ross began spending every night and every day at the residence. However, Ashley had little knowledge of the time Lori and Rob spent together after May 2012 when she moved, and her testimony was refuted by Lori's and Rob's testimonies. Based on all the evidence, a trial court could reasonably conclude this was a relatively short relationship and did not constitute residing together on a continuing conjugal basis.

¶ 35           Contradictory evidence was also presented on the amount of time the parties spent together and the nature of their activities. Lori and Rob spent a lot of time together, but some of this time could be because Rob worked for Lori. Lori's daughter also testified when she lived with Lori before May 2012, Rob shared meals, helped pay bills, made household decisions, and shared her mother's closet.

¶ 36           The extent to which Lori and Rob's personal affairs were intermingled was also unclear. Rob worked for Lori's cleaning company and it appeared he was treated as an employee and given a set prearranged payment for his activities. Lori and John had separate bank accounts.

Shortly after May 2012, when John stopped making support payments, Rob gave Lori \$4,000 to help her pay legal fees and to purchase a refrigerator and a bed. Both parties claim the money was a loan. Rob's father, Winn Ross, cosigned the loan for Lori's home. Winn testified he voluntarily offered to cosign on the loan to help Lori because he believed the home was a good investment.

¶ 37 The record indicates Rob and Lori went on one vacation together and spent holidays together. While these factors might tend to show a *de facto* husband and wife relationship, other factors are mixed or point to the opposite conclusion.

¶ 38 The trial court could reasonably have found John did not meet his burden to demonstrate cohabitation on a residential, continuing conjugal basis. The evidence suggested Rob maintained a separate residence, and Rob and Lori testified he was not always at Lori's residence. We hold the court's having found the evidence conflicting and insufficient to preclude a maintenance award was not against the manifest weight of the evidence. We affirm this portion of the trial court's judgment.

¶ 39 B. Maintenance

¶ 40 Under section 504(a) of the Dissolution Act, "the court may grant maintenance when it finds the spouse seeking maintenance lacks sufficient property, including marital property," to support the party's reasonable needs and "is unable to support herself through employment or is otherwise without sufficient income." *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 157, 621 N.E.2d 929, 933 (1993). Upon review, the amount and duration of maintenance awards "are matters that lie in the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion." *In re Marriage of Selinger*, 351 Ill. App. 3d 611, 614, 814 N.E.2d 152, 157 (2004).

¶ 41 Section 504(a) of the Dissolution Act requires courts to consider the following factors in awarding maintenance: (1) each party's income and property, including apportioned marital property; (2) each party's need; (3) each party's earning capacity; (4) impairments of earning capacity due to time devoted to domestic responsibilities during the marriage; (5) the time the party seeking maintenance needs to begin supporting themselves through appropriate employment; (6) the standard of living shared during the marriage; (7) the marriage's duration; (8) each party's age, physical, and emotional condition; (9) tax consequences of property division; (10) the party seeking maintenance's contributions to the education, license, training, or career potential of the other spouse; (11) a valid agreement by the parties; and (12) other factors the court expressly finds are just and equitable. 750 ILCS 5/504(a) (West 2012). "The policy underlying rehabilitative maintenance is to sever the financial ties between a former married couple in an expeditious, but just, manner and make each spouse independent of the other as soon as practicable." *In re Marriage of Cantrell*, 314 Ill. App. 3d 623, 628, 732 N.E.2d 797, 801 (2000).

¶ 42 In considering these factors, "the trial court must balance the goal of encouraging the recipient to become financially independent against a realistic appraisal of the likelihood the former spouse will be able to support himself or herself" at approximately the "standard of living established during the marriage." *In re Marriage of Culp*, 341 Ill. App. 3d 390, 394, 792 N.E.2d 452, 456 (2003). This court in *Selinger* held an award of "[r]ehabilitative maintenance is an abuse of discretion where the facts are clear that one spouse is unable to support herself in the manner in which the parties lived during their marriage." *Selinger*, 351 Ill. App. 3d at 615, 814 N.E.2d at 158. The court explained, "[l]imited maintenance is appropriate only where the spouse is employable at an income that would provide the approximate standard of living enjoyed during the marriage."

*Selinger*, 351 Ill. App. 3d at 615, 814 N.E.2d at 158.

¶ 43 In *Selinger*, this court overturned an order of rehabilitative maintenance where, after a 25-year marriage, the maintenance order ended when the parties' child graduated from high school. *Selinger*, 351 Ill. App. 3d at 619, 814 N.E.2d at 160. In *Selinger*, the ex-wife was a registered nurse making approximately \$36,000 a year and the ex-husband was a management-level employee making approximately \$100,000 a year. *Selinger*, 351 Ill. App. 3d at 616, 814 N.E.2d at 158. Here, the difference in income and earning potential is even greater, as Lori made less than \$20,000 and John made over \$125,000 yearly at the time of the dissolution. Lori's earning potential is lower than the ex-wife in *Selinger*, as Lori only has a GED.

¶ 44 John argues Lori's business is growing and will soon be sufficient to support her. This argument is not supported by the record. According to this court in *In re Marriage of Sisul*, 234 Ill. App. 3d 1038, 1040, 600 N.E.2d 86, 88 (1992), "[t]he trial court must not engage in speculation as to the future condition of the parties." The record shows some evidence of growth between 2011 and 2012, as Lori's income went from \$5,400 per year to \$23,000 per year. Growth during a one-year period does not show a business is "increasing at a substantial rate," and any assumption Lori's business will grow by the same amount next year is speculation. Further, in September 2012, Lori testified her income had recently fallen due to lack of clients. She also testified, although she advertises her business online and hopes to grow, she has no current plans to expand or hire additional employees. Her personal labor makes up the primary labor component of her business, which is an obvious limit on growth.

¶ 45 Illinois courts consider the fact that a wife's decision to work in the home and support a husband's career will likely result in his enjoying a much greater earning potential than

the former wife. *Harlow*, 251 Ill. App. 3d at 160, 621 N.E.2d at 936.

" ' "Marriage is a partnership, not only morally, but financially. Spouses are co-equals, and homemaker services must be recognized as significant when the economic incidents of divorce are determined. [Lori] should not be penalized for having performed her assignment under the agreed-upon division of labor within the family. It is inequitable upon dissolution to saddle [Lori] with the burden of her reduced earning potential and to allow [John] to continue in the advantageous position he reached through their joint efforts." ' " *Harlow*, 251 Ill. App. 3d at 160, 621 N.E.2d at 936 (quoting *In re Marriage of Kerber*, 215 Ill. App. 3d 248, 253-54, 574 N.E.2d 830, 833 (1991)).

To illustrate, in *In re Marriage of Drury*, 317 Ill. App. 3d 201, 210, 740 N.E.2d 365, 371 (2000), this court held terminating maintenance after 36 months, following a 29-year marriage, was an abuse of discretion. This court concluded, in addition to the significant disparities between the present and likely future incomes of the parties, the wife's contribution to the home and family allowed her husband to continue and advance his career. *Drury*, 317 Ill. App. 3d at 210, 740 N.E.2d at 371.

¶ 46 The parties married in 1989 and the marriage was dissolved in December 2013, they were married 23 years. The trial court specifically found Lori's standard of living has decreased since dissolution of the marriage, and as a result she is entitled to "temporary rehabilitative maintenance." Nothing in the record suggests in two years Lori will be able to support herself at

anywhere close to the standard of living enjoyed during the marriage. During the 23-year marriage, Lori's efforts to take care of the children and the household allowed John to focus on his career and helped increase his earning potential. Lori began her cleaning business only a few years ago and is trying to establish her firm in the cleaning business.

¶ 47 John contends he wanted Lori to work after their children started school and his expectation was Lori would continue her education. John maintained Lori even went to a few night school classes but was uninterested in finishing her education. However, John's and Lori's testimonies both indicated Lori was primarily responsible for child care and household duties when she began taking night classes. Lori did work during the marriage, first in child care and later as a caregiver and cleaning houses. Even if John preferred Lori continue her education, the family still benefitted from her continuing to take care of household responsibilities.

¶ 48 John asserts Lori did not further her education, not because of responsibilities at home, but because she had problems with alcohol and controlled substance abuse. Lori admitted she was addicted to alcohol and other controlled substances. Testimony from their daughter and John indicated these issues impaired Lori's ability to be a homemaker. John argues Lori's substance abuse problems could give the trial court reason to believe Lori needed "additional incentive to diligently attempt to become self-sufficient." Nothing in the record suggests Lori was not making diligent efforts to become self-sufficient or that her history of substance abuse was now preventing her from working. She had started her own business. John appears to essentially argue Lori's wrongdoing during the marriage warranted a shorter maintenance period.

¶ 49 We reject this argument, as it subtly argues the trial court can punish Lori for her past substance abuse problems by awarding only 24 months of rehabilitative maintenance. In

Illinois, fault is not a ground for determining the amount or duration of a maintenance award. See 750 ILCS 5/504(a) (West 2012) (stating "the court may grant a temporary or permanent maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct"). While the trial court could have believed Lori's substance abuse prevented her from significantly contributing to John's career prospects, such a consideration would be only one part of one factor, which must be balanced against other factors.

¶ 50 The trial court failed to sufficiently consider the very small amount of property awarded Lori in the dissolution or her reasonable needs. In *Drury*, this court held "[a]n award of maintenance must be balanced against the marital property award." *Drury*, 317 Ill. App. 3d at 209, 740 N.E.2d at 371. This court also noted the ex-wife did not receive significant assets where she received two residences worth \$14,000 and \$13,000 respectively but was responsible for \$6,000 in marital debts. *Drury*, 317 Ill. App. 3d at 210, 740 N.E.2d at 371.

¶ 51 Lori received limited assets. The parties agreed Lori would receive a 401(k) worth approximately \$16,000 and John would keep his retirement and pension, which upon his retirement will be worth \$250 and \$300 per month respectively and provide him with health insurance. Lori is also responsible for all the debts she incurred during their separation, which includes almost \$8,000 in medical bills and over \$2,000 on the rental home where she lived during the separation. The assets awarded to Lori are in a 401(k). She cannot use them until she retires or she will be suffer serious tax consequences. As a result, Lori has no assets from the marriage she can use to support herself but was apportioned significant marital debt.

¶ 52 The record also indicates Lori has a relatively high need for support. Currently, Lori is borrowing money to pay for basic necessities. She paid off very little of the house she

recently purchased for \$30,000. Lori is in her late 40s and has medical conditions such as ulcerated colitis, pancreatitis, depression, and back problems, which may require a third operation. These conditions, along with her self-employment, cause her to incur high insurance rates.

¶ 53 John also claims temporary maintenance is appropriate because he supported Lori during their four-year separation and, essentially, has already paid maintenance. John supported Lori while the parties were legally married but living apart from November 2009 until May 2012. John stopped this support when Ashley moved out. We note for the first two years of the separation Ashley was a minor and John would have been required to pay child support had the parties legally separated in 2009. For whatever reason, the parties chose to remain financially connected during the four year separation. It was commendable for John to provide child support and maintenance during this period, but those payments to assist his family do not mean the court-ordered period of maintenance should automatically be less.

¶ 54 John paid both of the parties' children's college expenses and claims his support for them could have been considered by the trial court in determining the length of Lori's maintenance agreement. John claims he spends \$1,225 dollars per month supporting his adult daughter Ashley, who is attending college classes and working part-time. Ashley is not a minor and John has not been ordered to pay her college or living expenses. John has no legal obligation to support his daughter. The statute does include a catchall allowing a court to apply "any other factor that the court expressly finds to be just and equitable" (750 ILCS 5/504(a)(12) (West 2012)). Once again, it was commendable for John to fulfill that parental responsibility, and the court could reasonably consider John's payment of Ashley's college and living expenses into a division of property. But those payments do not necessarily countervail against his ex-spouses needs.



¶ 55 John argues rehabilitative maintenance is appropriate because he "eliminated over \$74,000 in marital debt." The debt was paid in large part by liquidating a 401(k) worth over \$60,000, which was marital property. The payment of marital debt with marital property does not necessarily justify a shorter maintenance period.

¶ 56 Nothing in the record suggests by December 31, 2014, when Lori's rehabilitative maintenance ends, Lori will be able to support her reasonable needs or have achieved a livelihood providing her anywhere near the standard of living enjoyed during the parties' 23-year marriage. It is not realistic to believe a 47-year-old woman with a GED, who is a recovering substance-abuser with a host of medical problems and whose business is cleaning houses, will be able to achieve a decent standard of living without maintenance. Lori will have no marital assets available to her when maintenance ends. This heightens her need for continued maintenance. Awarding rehabilitative maintenance and shifting the burden of proof to Lori for an extension of maintenance was an abuse of discretion. We conclude maintenance should be permanent, but note maintenance can be modified based on a significant change in circumstances or certain statutory factors.

¶ 57 C. Attorney Fees

¶ 58 Lori claims the trial court abused its discretion by directing each party to pay their own attorney fees because (1) she could not afford fees but John could, as he makes about six times what she makes, and (2) she received no assets which she can be expected to use to pay attorney fees. John argues the court's denial of attorney fees was not an abuse of discretion because Lori's actions protracted the litigation, requiring him to incur greater fees. We agree with Lori.

¶ 59 Both parties cite authorities which held a party seeking contribution to attorney fees must show an inability to pay and the other spouse's ability to pay. See *Selinger*, 351 Ill. App. 3d

at 622, 814 N.E.2d at 163; *In re Marriage of Minear*, 287 Ill. App. 3d 1073, 1084, 679 N.E.2d 856, 865 (1997); *In re Marriage of Hale*, 278 Ill. App. 3d 53, 58, 662 N.E.2d 180, 184 (1996); *In re Marriage of Hassiepen*, 269 Ill. App. 3d 559, 569, 646 N.E.2d 1348, 1356 (1995); *In re Marriage of Carr*, 221 Ill. App. 3d 609, 612, 582 N.E.2d 752, 754 (1991). This court recently concluded a party seeking contribution to attorney fees under section 508(a) of the Dissolution Act need no longer show an inability to pay or the other spouse's ability to pay, as no such requirement is contained in the statute. *In re Marriage of Haken*, 394 Ill. App. 3d 155, 162, 914 N.E.2d 739, 745 (2009). Rather, "[a]ny award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504." 750 ILCS 5/503(j)(2) (West 2012). A trial court's decision to award attorney fees in a dissolution case will not be overturned absent an abuse of discretion. *Hassiepen*, 269 Ill. App. 3d at 569, 646 N.E.2d at 1356.

¶ 60           The trial court heard significant evidence about the financial status of the parties. Lori was borrowing money to get by and had to ask friends for money to pay attorney fees. At the end of the trial, John had incurred about \$12,000 in fees and Lori had only incurred about \$3,700. Further, the only marital asset Lori was awarded was a 401(k) valued at about \$16,800. If she uses the 401(k) to pay outstanding fees she will not only lose her only savings for retirement but will pay a heavy tax penalty for liquidating the 401(k). John makes about six times what Lori makes each year and has no dependents. The financial information John submitted shows he has significant disposable income. Based the parties' financial information, an award of attorney fees appears necessary. The court failed to make any factual finding justifying its failure to award attorney fees.

¶ 61 The trial court's delay in ruling on the motion for interim attorney fees violated the language and spirit of the Dissolution Act. Under Section 501(c-1) of the Dissolution Act, hearings related to interim attorney fees "shall be scheduled expeditiously by the court," and "the court \*\*\* shall assess an interim award against an opposing party in an amount necessary to enable the petitioning party to participate adequately in the litigation" 750 ILCS 5/501(c-1)(1), (3) (West 2012). In April 2012, Lori's first attorney, Jenkins, filed a petition requesting \$2,103 in interim attorney fees and set it for a hearing. John failed to appear at the hearing, and the court took the matter under advisement but made no ruling on the petition. In August 2012, Lori's second attorney, Dorsey, filed another petition for interim attorney fees, requesting \$3,150 for outstanding and anticipated legal fees. The parties agreed to discuss this petition at the October 2012 hearing. At the October 2012 hearing, Lori's counsel, Dorsey, requested his petition for attorney fees be heard and the court stated "we'll disclose [attorney fees] at the very end if we have time." Although the court noted Lori's petition for interim fees needed to be addressed quickly, the court waited to decide the issue until the final judgment on December 13, 2012. The docket entry stated "[e]ach party shall be responsible for the payment of their own [a]ttorney fees," giving no further explanation. The written judgment suggests this apportionment of fees was based on the parties' agreement. It would appear that is a scrivener's error. By waiting so long to render a decision, the court essentially disregarded section 501 of the Dissolution Act and left Lori with few financial resources with which to try to find legal representation and proceed toward dissolution.

¶ 62 John claims the trial court correctly denied Lori attorney fees because she caused "undue delay" and "protracted the litigation throughout the court proceedings." We disagree. The court can consider "the identity of the party who precipitated the need for the current legal fees." *In*

*re Marriage of Cotton*, 103 Ill. 2d 346, 361, 469 N.E.2d 1077, 1084 (1984) (quoting *Roth v. Roth*, 52 Ill. App. 3d 220, 228, 367 N.E.2d 442, 449 (1977)). In *Cotton*, the court upheld a trial court's denial of an award of attorney fees to a ex-wife after a custody dispute resulting from the ex-wife neglectfully placing the child in a dangerous environment. *Cotton*, 103 Ill. 2d at 361, 469 N.E.2d at 1084. This case is distinguishable from *Cotton* because Lori's alleged misconduct (not responding to discovery requests in a timely manner, hiring a different attorney, and arriving late for a hearing) did not cause the need for all or even the majority of the attorney fees. Rather, the dissolution of the party's 23-year marriage precipitated the need for legal fees.

¶ 63 The trial court made no finding that Lori caused unreasonable delays during the trial. If the trial court based the allocation of attorney fees to Lori on her misconduct, a finding of misconduct should have been expressly stated. Basing a denial of attorney fees on the alleged misconduct here would be problematic because it would create a catch-22 for the litigant most in need of attorney fees. The trial court would essentially deny Lori the use of a statute created to ensure spouses who cannot afford an attorney can participate in the litigation because she had difficulty participating in the litigation. Such an outcome would undermine the statute's goal to ensure just treatment through adequate participation by each spouse.

¶ 64 The trial court's decision to deny Lori an award of attorney fees was an abuse of discretion as (1) a large disparity exists between the incomes of each party and (2) Lori received little marital property. Each side has spent sufficient time and money on attorney fees in this case. Therefore, rather than remanding and ordering a hearing on the issue of attorney fees, we reverse and direct John to be responsible for \$3,150 of Lori's attorney fees plus the costs of this appeal. Fees Lori has already paid, although with borrowed money, will not be John's responsibility.

¶ 65

### III. CONCLUSION

¶ 66

For the foregoing reasons, (1) we affirm the trial court's finding of insufficient evidence of cohabitation on a resident, continuing conjugal basis; (2) as rehabilitative maintenance was inappropriate following the parties 23-year marriage and considering the significant disparity in earnings and earning potential between the parties, we modify the trial court's award of rehabilitative maintenance to permanent maintenance; and (3) we reverse the trial court's ruling on attorney fees and award Lori all fees she has yet to pay.

¶ 67

Affirmed in part as modified and reversed in part.